IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No.

IN THE MATTER OF

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CLAUDE A. ROTH, TRUSTEE, CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

VS.

LILLIAN CARLSON, AS ADMINISTRATRIX, ETC.; OF THE ESTATE OF CHARLES A. ANDERSON, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The statement of the ground on which the jurisdiction of this court is invoked, a concise statement of the case containing all that is material to the consideration of the questions presented, and specification of errors to be urged, are contained in the accompanying petition.

SUMMARY OF ARGUMENT.

I.

Although the Illinois law presumes a man dead at the end of seven years, it does not necessarily presume that he was alive during any part of that period. In order to sustain her claim the claimant must show in some manner that Anderson was alive for seven years.

(a) The Illinois Supreme Court has twice held that where establishment of a claim depends on continued life there must be affirmative proof of that fact.

Keystone Steel and Wire Co. v. *Industrial Commission,* 289 Ill. 587.

National Zinc Co. v. *Industrial Commission,* 292 Ill. 598.

(b) The presumption of immediate death may arise from the circumstances surrounding the disappearance of a person.

Eddy v. *Eddy,* 302 Ill. 446.

Reedy v. *Millizen,* 155 Ill. 636.

Whiting v. *Nicholl,* 46 Ill. 230.

(c) In any case, one opposing the claim of continued life is not required in Illinois to prove as a fact that death occurred before the end of seven years. Facts sufficient to warrant a presumption of death are enough.

Donovan v. *Major,* 253 Ill. 179.

Davis v. *Metropolitan Life Insurance Company,* 285 Ill. App. 398.

Kennedy v. *Modern Woodmen,* 243 Ill. 560.
Shank v. *Modern Woodmen of America,* 213 Ill. App. 506.

II.

The Special Master's presumption of continued life was an inference for which the District Court could substitute its own inference.

(a) There was no evidence in the record as to whether Anderson was alive or dead from December 21, 1932, to December 20, 1939. The Master could make only an inference of his continued life.

(b) The District Court was not bound by any rule to accept and adopt the Master's inference

Ohio Valley Bank v. *Mack,* 163 Fed. 155, 24 L. R. A. (N. S.) 184.

Budd Mfg. Co. v. *Wilson Body Co.,* 21 Fed. (2d) 803.

Stewart v. *Ganey,* 116 Fed. (2d) 1010.

Kycoga Land Co. v. *Kentucky River Coal Corp.,* 110 Fed. (2d) 894.

(c) The Circuit Court of Appeals improperly applied Rule 53 (e) (2).

Adams County v. *Northern Pacific Ry.,* 115 Fed. (2d) 768.

Stewart v. *Ganey,* 116 Fed. (2d) 1010.

ARGUMENT.

I.

Although the Illinois law presumes a man dead at the end of seven years, it does not necessarily presume that he was alive during any part of that period. In order to sustain her claim, the claimant must show in some manner that Anderson was alive for seven years.

(a) The Illinois Supreme Court has twice held that where establishment of a claim depends on continued life there must be affirmative proof of that fact.

(b) The presumption of immediate death may arise from the circumstances surrounding the disappearance of a person.

(c) One opposing the claim of continued life is not required in Illinois to prove as a fact that death occurred before the end of seven years. Facts sufficient to warrant a presumption of death are enough.

There is no question about the Illinois law holding that the unexplained disappearance of one for seven years creates a presumption of death. (*Whiting* v. *Nicholl*, 46 Ill. 230 (1867), 92 Am. Dec. 249; *Reedy* v. *Millizen*, 155 Ill. 636 (1895).) The great majority of the cases in this State are concerned with necessity of the party seeking recovery establishing the death of a person. Most of the cases involve collection under insurance policies.

This claim is for Anderson's pension for seven years. Before it can be allowed it must be established either by way of presumption or by proof of facts that Anderson lived for seven years from the date he disappeared on December 21, 1932. If he was alive he would have collected his pension from the Chicago and North Western Railway Company. If he died on or about the day he disappeared the pension payments would have terminated at once. The only question in this case concerns the pension granted to Anderson. There was no provision in the Company's pension system for payments to his children or to anyone other than the pensioner himself.

Under the peculiar circumstances of this case, it was incumbent upon claimant to establish the continued life of Anderson during the period involved. Two cases in Illinois have dealt squarely with the question of whether continued life will be presumed. In those two cases it was necessary for the one seeking recovery to show that certain persons were alive, although they had not been heard from for several years. In each of these cases the persons concerned were residents of foreign countries which were invaded by the enemy during the First World War.

In the case of *Keystone Steel & Wire Co.* v. *Industrial Commission*, 289 Ill. 587, the Illinois Supreme Court said, at page 590:

> "The existence of the alleged beneficiaries lying at the very foundation of the right of compensation, it should not rest only on a mere presumption advanced by one who does not represent them and has heard nothing from them but only knows that they were living some years before the accident."

In another case (*National Zinc Co.* v. *Industrial Commission,* 292 Ill. 598, at 600), the Supreme Court said:

> "In either case the existence of a beneficiary at the time of the hearing furnishes the sole basis of a claim for compensation and an award can only be made upon affirmative proof of that fact."

In these two cases, concerned with the question of whether a person was living, the Illinois Supreme Court has twice held that where recovery is sought on the basis of continued life the fact of life will not be presumed but must be established.

It was the opinion of the Special Master that he should presume that Anderson continued to live for seven years. He also thought that the only way this presumption could be overcome was for the Trustee to prove as a fact that Anderson died at the time he disappeared. The Special Master said in his report that the Trustee had the burden of establishing the fact that death occurred some time in December, 1932, or soon thereafter. (R. 55) This conclusion of the Special Master is directly contrary to the overwhelming weight of authority in Illinois.

The Supreme Court of Illinois has recognized the difficulty of proving the fact that a man is dead at the time, or soon after, he disappears. In order to avoid injustice a companion rule to the presumption of death doctrine has been created in Illinois. By this rule, one desiring to show death before the expiration of the seven-year period may do so by proving intervening facts. If the court may infer from these facts that the person died during the seven years, there arises a presumption that he died at the time these facts intervened. *Eddy* v. *Eddy,* 302 Ill. 446. In that case the court said (at p. 455):

"The law presumes that a person shown to be alive at a given time remains alive until the contrary is proved or a different presumption arises."

In *Reedy* v. *Millizen,* 155 Ill. 636, the Court said (at p. 639):

"So if circumstances be shown which will be deemed sufficient to raise the presumption of death before the expiration of the seven years' absence or at any particular time within the seven years, the presumption of life will be overcome."

In *Whiting* v. *Nicholl,* 46 Ill. 230, the Illinois Supreme Court held (at p. 236):

"It was undoubtedly the right of appellant to rebut this presumption by showing from facts and circumstances that his death in all probability happened before that day or on any day of any month or year between that day and the day on which he was last heard from."

In *Donovan* v. *Major,* 253 Ill. 179, the Illinois Supreme Court said:

"The presumption of the continuance of life prevails until facts are shown which make the presumption of death more reasonable. Disappearances of individuals are not uncommon, and no legal presumption of death arises from the disappearance, alone. The presumption of fact which will justify the conclusion of death before the lapse of the time required for the legal presumption must arise from evidence of circumstances tending to show death. That the absentee was exposed to some specific peril; * * * that the condition of his health was desperate; * * * these are circumstances which may be considered as tending to raise a just inference of death." (pp. 183-184)

The Illinois courts in the following cases have followed this same rule:

Davis v. *Metropolitan Life Insurance Company,* 285 Ill. App. 398;

Kennedy v. *Modern Woodmen,* 243 Ill. 560;

Shank v. *Modern Woodmen of America,* 213 Ill. App. 506.

The reasonable inference to be drawn from the circumstances of Anderson's disappearance is that he died soon thereafter. He was an old man, obviously confused, inadequately clothed for intemperate weather, wandering in a rugged country, entirely strange and unknown to him. There were many natural perils around him which the infirmities of age aggravated. He was lost to his family. He disappeared from all the officers of the law who, if they had found him, could have identified him quickly and communicated with his daughters.

The Special Master fully realized how unreasonable it was to assume Anderson survived all dangers and perils. He said in his opinion: "This may appear to be an arbitrary conclusion, but, as the Supreme Court of Illinois has stated in some of the cases above referred to, this is an '*arbitrary*' presumption adopted by the courts to meet just such a situation as is presented herein." (Special Master's emphasis) (R. 55-56)

To overcome this presumption of survival the Special Master was of the opinion the Trustee must prove the *fact* of death. He said there is a burden of proof "resting upon the Trustee to *establish* the *fact* that death occurred sometime in December, 1932, or soon thereafter." (R. 55) (Emphasis supplied)

The Special Master apparently shut his mind to all the circumstances surrounding the disappearance of Anderson when he concluded that none of the evidence established the fact of Anderson's death. There is no specific evidence that he died when he disappeared. Though the circumstances could be established the fact of death could not be. If this was required of the Trustee he failed. But the Special Master required more of the Trustee than the Supreme Court of Illinois requires.

The District Judge tried to correct this obvious error by the Special Master, but the Circuit Court of Appeals would not allow him to do so.

II.

The Special Master's presumption of continued life was an inference for which the District Court could substitute its own inference.

(a) There was no evidence in the record of whether Anderson was alive or dead from December 21, 1932 to December 20, 1939. The Special Master could make only an inference of his continued life.

(b) The District Court was not bound by any rule to accept and adopt the Special Master's inference.

(c) The Circuit Court of Appeals improperly applied Rule 53 (e) (2).

The evidence in the record on the point here involved is disputed by neither party and the credibility of witnesses is not questioned. The Special Master's recitation of the facts in his report is so complete that it was used on the appeal to the Circuit Court of Appeals and is being used on this petition in lieu of an abstract of record.

The Special Master, on the basis of the record, could not make a finding of fact of life nor of death. He could only reach inferences on those questions. Under the circumstances, the District Judge hearing the case, considering the same facts, had just as much right as the Special Master to draw his own inferences. The Judge exercised this right and held that the presumed continuance of Anderson's life for seven years following his disappearance was not justified by the record. That point was the essence of claimant's case. As the claimant failed in that respect, the District Court ordered that the claim be disallowed.

When the Circuit Court of Appeals considered the case it misunderstood the effect of the Special Master's report. What actually was a conclusion of law that court thought was a finding of fact. It therefore applied Rule 53(e)(2) and said, in its opinion (R. 113): "On this record, we cannot say that the master's findings are clearly erroneous." It thereupon reversed the District Court.

For many years the Federal Courts have distinguished between a finding of fact and a deduction from an established fact. The former carries great weight when the case is considered by a reviewing court; the latter does not. (*Ohio Valley Bank* v. *Mack*, 163 Fed. 155, 24 L. R. A., New Series, 184 (Sixth Circuit))

In *Budd Mfg. Co.* v. *Wilson Body Co.*, 21 Fed. (2d) 803 (Sixth Circuit), the court said (at p. 804):

> "But in many cases, and particularly in this case, these findings are only deductions from other established facts as to which there is no substantial dispute. In such a situation a master's findings do not carry any great weight."

The United States Circuit Court of Appeals for the Fifth Circuit considered specifically the application of Rule 53(e)(2) and General Order in Bankruptcy No. 47 in the case of *Stewart* v. *Ganey*, 116 Fed. (2d) 1010. At page 1013 the court said:

> "When a referee's finding is based wholly upon an inference, drawn from uncontradicted facts, and the reasonableness of the inference may be as fairly determined by the court as by the referee, no presumption in favor of the referee's finding exists which binds the independent judgment of the court."

The Circuit Court of Appeals for the Sixth Circuit, in the recent case of *Kycoga Land Co.* v. *Kentucky River Coal Corp.*, 110 Fed. (2d) 894 (1940), said (p. 896):

> "But the master's findings are here based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him, and in this situation any presumption in favor of his conclusions can be of but slight importance."

In *Adams County* v. *Northern Pacific Ry.*, 115 Fed. (2d) 768, the Ninth Circuit of the U. S. Court of Appeals, commented on the fact that Rule 53(e)(2) does not control a reviewing court when it considers a master's inferences predicated upon admitted facts (p. 779).

The Court of Appeals for the Seventh Circuit, in 1940, rendered an opinion construing Rule 53(e)(2). That case, *Santa Cruz Oil Corporation* v. *Allbright-Nell Co.*, 115 Fed. (2d) 604, concerned an appeal from the District Court which had reversed the findings of fact of a Master to whom the case was referred. The Court of Appeals reversed the District Court holding that the case was singularly within the rule that a master's findings of fact based on conflicting testimony and credibility of witnesses must be accepted unless clearly erroneous. That case is to be distinguished from the present one

because in this case there is no conflicting testimony on any material fact and the Master's so-called finding here involved is a presumption or inference.

In the case of *Carter Oil Company* v. *McQuigg*, 112 Fed. (2d) 275, the Seventh Circuit reviewed an order of the District Court. Among other things, the court considered the weight to be given to findings made by a District Court in conflict with the findings of a special master who saw and heard the witnesses. The Court said it did not agree that under Rule 53(e)(2) more weight is to be given the report of a special master than under Equity Rule 61½ which deals with the same subject. The court said that where the evidence consists of documents and depositions the master is in no better position to determine an issue of fact than a reviewing court. The court then observed, "Difficulties threaten when much of the testimony is uncontradicted, but conflicting inferences are properly deducible therefrom." (p. 279) The court, however, did not squarely pass upon the question we are here presenting.

This doctrine that a reviewing court is not bound by the inferences of a master has been followed uniformly, and, as far as we know, without exception, by the Federal Courts for many years. The essence of the doctrine does not appear to have been changed to any degree by the adoption of Rule 53(e)(2). However, the court, in our case, brought into question the construction and operation of this rule and, apparently, reached the conclusion that the District Judge was bound thereby to accept the inferences, conclusions and presumptions of the Special Master.

When the Circuit Court of Appeals, in this case, said that the Special Master's report must be followed unless clearly erroneous, it was departing from the accepted and usual course of judicial proceedings relating to masters' reports.

We respectfully submit that this departure deserves the attention of this court and calls for an exercise of this court's power of supervision in order to prevent confusion with respect to Rule 53(e)(2).

CONCLUSION.

It is, therefore, respectfully submitted that, as the Circuit Court of Appeals for the Seventh Circuit has decided important questions of Illinois law in a way in conflict with the applicable Illinois decisions, and has departed from the accepted and usual course of judicial proceedings in the federal courts, this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted as prayed in the accompanying petition and this court should review the decision of the court below and finally reverse it.

Respectfully submitted,

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February 10, 1944.